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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 37

TEXTILE WORKERS UNION OF AMERICA,
Petitioner
v.
DARLINGTON MANUFACTURING COMPANY,
ET AL.

NO. 41

NATIONAL LABOR RELATIONS BOARD,
Petitioner
v.
DARLINGTON MANUFACTURING COMPANY,
ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

This case presents a number of issues of evident major concern to organized labor. In order to avoid duplication, and by arrangement with counsel for the Textile Workers

Union of America (TWUA), this brief will deal only with the questions whether it is a violation of the National Labor Relations Act for an employer to shut down a plant in order to discourage union activity and to avoid having to bargain with a union (1) upon the assumption that the plant closed constitutes a separate business entity and (2) upon the contrary assumption that the plant is one of several constituting a single employer entity.

ARGUMENT

The NLRB unanimously found that the Darlington plant was shut down in order to discourage union activity by its employees and to avoid having to bargain with the Union. (R. I, 6-9.) Four members of the Board held that this closing of the Darlington mill violated § 8(a)(3), (5) and (1) of the Act, even viewing the Darlington mill as a separate entity.[1] The Board further held, by a vote of 3-2, that Darlington was not a separate entity but was one plant of several in a single employer entity consisting of Darlington and various related corporations, collectively referred to as Deering-Milliken.[2] (R. I, 23-27.)

The Court of Appeals, by a vote of 3-2, denied enforcement. The court majority accepted, at least arguendo, the findings of the Board as to the motives for closing the Darlington plant, and that Darlington was one plant of several comprising a single employer entity, but declared (R. VI, 1899):

> "To go out of business in toto, or to discontinue it in part, permanently at any time, we think was Darlington's absolute prerogative."

[1] Only Member Rodgers dissented from this conclusion. He took the position that the permanent cessation of an employer's entire business cannot violate the Act, regardless of motivation. (R. I, 35-38.)

[2] Members Rodgers and Leedom dissented from this holding. (R. I, 34, 35.)

The majority opinion seems also, or alternatively, to take the position that in any event an employer who has gone out of business cannot be reached by a Board order.[3]

The holding of the court below that there was an absolute right to shut down Darlington, "even if Darlington was a division of Milliken" (R. VI, 1901), represents a uniquely extreme view. It does violence to the language and policy of the Act, and as far as we have found, it is contrary to every other pronouncement on the subject whether by judges, Board Members,[4] or legal commentators.[5] Save for the three judges comprising the majority below, everyone who has considered the subject had concluded that it is a clear violation of the Act for an employer to shut down one of several mills, or any part of an operation, because the employees have chosen to be represented by a union.

While few cases have arisen involving the shutting down of an entire business, we submit that the Board majority is correct in holding that no distinction is to be made between a total and a partial shutdown.

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[3] The dissenting judges so read the opinion. (R. VI, 1902.)

[4] Board Member Rodgers, though he dissented from the Board's decision, did not take the position taken by the court below. Member Rodgers' view was that Darlington was a separate entity, and that an employer has an absolute right to cease business entirely.

[5] See, *e.g.*, Note, *Business Liquidation as an Unfair Labor Practice*, 48 Cornell L. Q. 572 (1963); Note, *Termination of a Business to Avoid Unionization—Rights and Remedies*, 1963 Duke L. J. 786; 49 Va. L. Rev. 616 (1963); 111 U. Pa. L. Rev. 672 (1963); 16 Stanford L. Rev. 209 (1963); 51 Ill. B. J. 588 (1963); Johannesen, *The Case of the Runaway Mill: Darlington Mfg. Co.*, 12 Lab. L. J. 1189 (1961); Schoemer, *Case of the Runaway Author: Professor Johannesen's Article on the Darlington Case*, 13 Lab. L. J. 356 (1962). Mr. Schoemer was one of the attorneys for respondent Deering-Milliken, Inc., in the court below. His article is quoted *infra*, p. 13.

I

THE DECISION BELOW EMASCULATES THE LANGUAGE AND POLICY OF THE ACT

It is clear beyond cavil that under the literal language of the Act it is an unfair labor practice for an employer to discontinue business, whether in whole or in part, in order to avoid dealing with a union or as a retaliation against his employees for voting for a union.

Section 8(a) declares that it shall be an unfair labor practice for an employer "(3) by discrimination in regard to * * * tenure of employment to * * * discourage membership in any labor organization * * *." Surely an employer who shuts down a plant, and terminates the jobs of its employees, engages in discrimination in regard to tenure of employment; and surely when the shutdown is to punish the employees because a majority voted for a union, the discrimination is for the purpose of discouraging membership in a union. As the Board said, it is an "uncomplicated, literal violation of § 8(a)(3)." (R. I, 10.)

Section 8(a) likewise declares that it shall be an unfair labor practice for an employer "(5) to refuse to bargain collectively with the representatives of his employees * * *." Here the employer nakedly refused to bargain, and closed the plant—an uncomplicated, literal violation of § 8(a)(5).

Again, § 8(a) declares that it shall be an unfair labor practice for an employer "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Among the rights guaranteed in § 7 are the rights to join a union and to bargain collectively through representatives of their own choosing. Surely it cannot be questioned that an employer interferes with, restrains, and coerces employees in the exercise of these rights when

the employer closes a plant as retaliation for joining a union, and to avoid bargaining.

As stated in a discussion of the present case in 111 U. Pa. L. Rev. 672, 673-674 (1963):

> "To allow a business to operate on condition that its workers remain unorganized and to shut down should they engage in union activities not only destroys the workers' right to self organization after an election, but tolerates the imposition of an implicit deterrent to any organizational activity."

Section 8(a)(3) does not say that an employer shall not discriminate except by closing a plant; § 8(a)(5) does not say that an employer shall not refuse to bargain collectively, unless he chooses to close his plant; § 8(a)(1) does not say that an employer shall not interfere with, restrain or coerce employees in the exercise of their rights under the Act, except by closing his plant. Yet the court below in effect read these exceptions into the Act.

This rewriting of the Act was in derogation of its stated broad policies, as well as of its literal language. Section 1 (b) of the Taft-Hartley Act declares that—

> "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under the law one another's legitimate rights * * *.
>
> "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers * * *."

Plainly it will not promote the "full production of articles and commodities for commerce" or the "full flow of commerce" to permit employers to shut down their plants as a way of denying to employees their legitimate rights as

defined in the Act. To write such a dogma into the Act negates its basic policies.

And no distinction can be drawn on the basis of either the literal language or the general policies of the Act between closing one plant among several or the complete cessation of an entire business.

The holding of the court below makes a mockery of the Act, for it sanctions a way of totally destroying the rights guaranteed to employees by the Act, and of punishing the employees into the bargain for having sought to exercise those rights. As one commentator put it, the shutdown is the "ultimate weapon" in "the arsenal of the recalcitrant employer." Note, *Business Liquidation as an Unfair Labor Practice*, 48 Cornell L. Q. 572, 584 (1963).

Not only were the rights of the employees to join and bargain through a union wholly frustrated; but they were punished by being permanently discharged. Non-union employees, the community as a whole, and perhaps minority stockholders,[6] were also damaged by the fallout, since plant shutdown is an unselective weapon.

II

THE DECISION BELOW CONFLICTS WITH LONG-ESTABLISHED DOCTRINES

The holding below is utterly inconsistent with numerous doctrines long established by the Board and approved by the courts; including the court below.

1. Apart from the holding below in the present case, the Board and court decisions uniformly hold that it is an

[6] Some of the residents of Darlington who owned stock in Darlington Manufacturing Company voted against liquidation. (R. II, 494-495.)

unfair labor practice for an employer to shut down either his entire operation,[7] or one of several plants,[8] or to discontinue a part of his business[9] in order to avoid dealing with a union or as a reprisal against his employees for having joined or voted for a union. In *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U. S. 87, 93, this Court referred with evident approval to—

> "the cases in which the lockout has been held unlawful because designed to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain."[10]

So also it is a violation of the Act for an employer to subcontract a part of his operations in order to rid himself

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[7] *NLRB* v. *Norma Mining Corp.*, 206 F. 2d 38 (4th Cir.) (temporary shutdown); *Star Baby Co.*, 140 NLRB 678 (permanent closing), *enforcement denied on other grounds* (2nd Cir., July 17, 1964); *M. Yoseph Bag Co.*, 128 NLRB 211, *remanded sub nom. District 65, Retail Union* v. *NLRB*, 294 F. 2d 364 (3d Cir.), *question rendered moot on remand*, 139 NLRB 1310 (permanent closing); *Barbers Iron Foundry*, 126 NLRB 30 (permanent closing).

[8] *NLRB* v. *Wallick*, 198 F. 2d 477 (3d Cir.) (permanent closing); *NLRB* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (2d Cir.), *cert. denied*, 344 U. S. 816 (temporary shutdown); *Sidele Fashions, Inc.*, 133 NLRB 547, *enforced per curiam*, 305 F. 2d 825 (3rd Cir.) (permanent closing); *New England Webb, Inc.*, 135 NLRB 1019, *enforcement denied on other grounds*, 309 F. 2d 696 (1st Cir.) (permanent closing).

[9] *NLRB* v. *Savoy Laundry, Inc.*, 327 F. 2d 370 (2d Cir.) (permanent closing); *NLRB* v. *Missouri Transit Co.*, 250 F. 2d 261 (8th Cir.) (permanent closing); *St. Cloud Foundry & Machinery Co.*, 130 NLRB 911, *enforced by default*, 295 F. 2d 511 (8th Cir.) (permanent closing); *Williams Motor Co.* v. *NLRB*, 128 F. 2d 960 (8th Cir.) (permanent closing); *Superior Maintenance Co.*, 133 NLRB 746 (permanent closing); *Abe Adolph Bochner*, 85 NLRB 633, *enf'd per curiam*, 180 F. 2d 1021 (3d Cir.) (permanent closing).

[10] At this point the Court cited, inter alia, the *Wallick* and *Somerset Classics* cases, cited *supra*, note 2.

of a union,[11] or to discontinue one part of his operation and transfer its work to other parts.[12]

It has likewise been settled since the early days of the Wagner Act that it is an unfair labor practice for an employer to move his business from one location to another to evade bargaining with a union.[13] The principle in these cases is of course precisely the same as in the plant shut down cases. Indeed, when, as in the present case, an employer who operates several plants closes one of them and increases production at the remaining plants, plant shut down and plant removal become undistinguishable.

And, as stated in 16 Stanford L. Rev. 209, 214 (1963):

> "[T]here seems to be no valid distinction between a case of complete liquidation and cases holding that a plant relocation, shutdown of part of a plant operation, or shutdown of one of a number of plants solely or primarily because of union hostility constitutes a violation of the act. In all four situations the traditional rights of management prerogative and 'free enterprise' are subordinated to the overriding policy of fair labor practices."

None of these decisions, whether dealing with the shutting down of an operation in whole or in part, or with plant

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[11] *Town & Country Manufacturing Co.*, v. *NLRB*, 316 F. 2d 846 (5th Cir.); *NLRB* v. *Preston Feed Corp.*, 309 F. 2d 346 (4th Cir.); *NLRB* v. *Hugh Major*, 296 F. 2d 466 (7th Cir.); *NLRB* v. *Kelly & Picerne, Inc.*, 298 F. 2d 895 (1st Cir.); *NLRB* v. *Brown-Dunkin Co.*, 287 F. 2d 17 (10th Cir.).

[12] *NLRB* v. *Winchester Electronics*, 295 F. 2d 288 (2d Cir.); *NLRB* v. *Lexington Electric Products Corp.*, 283 F. 2d 54 (3d Cir.); *cert. denied sub nom. Local 3, International Brotherhood of Electrical Workers, AFL-CIO*, 365 U. S. 845; *A. M. Andrews Company of Oregon* v. *NLRB*, 236 F. 2d 44 (9th Cir.).

[13] *S & K Knee Pants Co.*, 2 NLRB 940; *Jacob H. Klotz*, 13 NLRB 746; *Scheiber Millinery Co.*, 26 NLRB 937; *Gerity Whitaker Co.*, 33 NLRB 393, *enf'd*, 137 F. 2d 198 (6th Cir.); *Rome Products Co.*, 77 NLRB 1217; *Industrial Fabricating, Inc.*, 119 NLRB 162; *Bermuda Knitwear Corp.*, 120 NLRB 332.

removal, or with subcontracting, or with the transfer of work from one establishment to another, turned on whether the employer's action was of permanent or temporary character, though in most instances the former was the case. While the permanent or temporary nature of the employer's action may affect the problem of framing an appropriate remedy, it is irrelevant to the question whether the employer's conduct violates the Act.

However, the majority below declared that the right to shut down permanently is peculiarly sacrosanct, and it distinguished its earlier decision in *NLRB* v. *Norma Mining Corp.*, 206 F. 2d 38 (4th Cir.), on the ground that "Darlington's was an absolute desistence, not a temporary intermission as apparently was contemplated" in *Norma*. Although the Trial Examiner's Report in *Norma* discloses that the shutdown of the mine in that case was temporary, that factor was not so much as adverted to in either the Board's decision or that of the court below. There is no basis either in principle or in the language of the Act for distinguishing between a temporary and a permanent closing. And usually there is no basis of distinction as respects the effect on the employees; for in most cases, including *Norma*, they were laid off permanently, even though the operation was subsequently reopened.

2. It is well established that it is an unfair labor practice for an employer to threaten to go out of business if the employees select a union as their bargaining representative. Such a "threat of reprisal" is not within the protections of § 8(c) or of the First Amendment. *NLRB* v. *Abrasive Salvage Co.*, 285 F. 2d 552 (7th Cir. 1961); *NLRB* v. *Realist, Inc.*, 328 F. 2d 840 (7th Cir. 1964), *cert. denied*, 377 U.S. 994; *NLRB* v. *New England Upholstery Co.*, 268 F. 2d 590 (1st Cir. 1959); *NLRB v. Empire Mfg. Corp.*, 260 F. 2d 528 (4th Cir. 1958); *NLRB* v. *Howard-Cooper Corp.*, 259 F. 2d 558 (9th Cir. 1958);

NLRB v. *Hoppes Mfg. Co.*, 170 F. 2d 1962 (6th Cir. 1948); *Atlas Underwear Co.* v. *NLRB*, 116 F. 2d 1020 (6th Cir. 1941); *McGregor & Werner, Inc.*, 136 NLRB 1306 (1962); *Worth Mfg. Co.*, 134 NLRB 444 (1961). Indeed threats to close the Darlington plant if the union won the election were held by the Board to be an unfair labor practice in this very case. (R. I, pp. 6-7.) The majority below did not deny that these threats constituted an unfair labor practice;[14] while the dissenting judges declared (R. VI, 1914):

> "The repeated threats of members of management that the mill would be shut down if the union won the representation election constituted a classic form of interference, restraint, and coercion proscribed by Section 8(a)(1)."

It would be utterly anomalous to hold that a threat to close is a violation of the Act, but that the actual closing—the effectuation of the threat—is not. If a threat to close interferes with, restrains and coerces employees in the exercise of the rights guaranteed in § 7, the actual closing does so in much greater degree.

It may be noted that threat to close, like an actual closing, is aimed at all employees, union adherents and opponents alike. But that has never been thought to render the conduct permissible. Any principle that an employer may threaten or penalize his employees if a majority vote for a union, so long as he penalizes all employees, union and non-union alike, would be utterly destructive of the rights guaranteed by the Act. Such a doctrine would intimidate all employees everywhere from exercising those rights, and not merely the employees of a particular recalcitrant employer.

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[14] Referring presumably to these and other violations the court held that "Remedies for these offenses are not now available as Darlington is no longer alive." (R. VI, 1902.)

None of the courts which have held that a threat to close is an unfair labor practice have suggested that it makes any difference whether the threat is to close permanently or temporarily, or is to close an entire business or only part of one.

3. The closing, or subcontracting, or transfer of an operation to another location, as a reprisal against employees for union activity, does not differ in substance from the naked discharge of employees for engaging in union activity.[15]

This is well put in Note, *Business Liquidation as an Unfair Labor Practice*, 48 Cornell L. Q. 572, 581 (1963):

> "Darlington's contention, when carried to its logical extreme, would imply that if the company had discharged ninety-nine percent of its employees, this would be an unfair labor practice; but that if it had discharged one hundred percent of them and liquidated its business, this would not be a violation. Clearly, each is an attempt by the employer to avoid the statutory duty to bargain dictated by the NLRA; hence, each should be an unfair labor practice."

In *Bonnie Lass Knitting Mills, Inc.*, 126 NLRB 1396 (1960), the employer discharged 100 employees, retaining only three. Surely the employer would have not been in any better legal posture if he had also discharged the three.

III

AN EMPLOYER HAS NO ABSOLUTE RIGHT TO CLOSE A PLANT, REGARDLESS OF MOTIVE

The court below held that an employer has an "absolute prerogative" to go out of business at any time, regardless

[15] Thus in *NLRB* v. *Truck Drivers Local Union No. 449*, quoted *supra* p. 7, this Court, after referring to cases in which "the lockout has been held unlawful," cited not only cases involving lockout but also *Associated Press* v. *NLRB*, 301 U. S. 103 (1937)—the leading case on discriminatory discharge.

of motive, just so long as he goes out of business "permanently." On this basis the court denied enforcement of the Board's order, both in whole or in part. This ruling has no visible means of support, factual or legal.

1. To begin with, in view of the court's acceptance, arguendo, of the Board's finding that Darlington was one plant of several constituting a single employer entity—i.e., Deering-Milliken, there is no basis for saying that this employer went out of business, either permanently or temporarily. Certainly Deering-Milliken did not go out of business. It merely liquidated one of several plants.

In its original opinion the court below not only asserted that Darlington had gone out of business "permanently," but that the manufacturing done at Darlington was not transferred to other Milliken mills when Darlington was shut down. Thus in its original form the decision below in part read:

> "Of course, the right of discontinuance which we here uphold, means an actual, unfeigned and permanent end of operations—not a removal, nor subcontract, nor a change merely in the form of the corporate entity. No ruse or subterfuge is suggested here. * * * It is noteworthy that Darlington was the only Milliken related plant manufacturing print cloth, and since its liquidation none of the remaining mills has undertaken the manufacture of that kind of product."

However, the final sentence of this paragraph was deleted by the court by order dated December 9, 1963. (R. VI, 1916-1917.)

Presumably the court deleted the sentence because it was not factually accurate. The Darlington plant was closed permanently and its equipment sold at auction on a piecemeal basis. (R. I, 6, II, 258.) At the time of the liquidation, Darlington was making four different types of cloth, two of which were also being made by other Deering-Milliken

mills. Darlington's unfilled contracts for these two types of cloth were taken over by other Deering-Milliken mills. (R. III, 933-934.) Darlington's contracts for the other two types of cloth were cancelled, but within a few months other Deering-Milliken mills began to make cloth of the two types theretofore made only by Darlington. (R. III, 934 *ff.*; 955 *ff.*)

Thus even if the tests advanced by the court below were accepted as legally significant, *i.e.*, that the employer must go out of business "permanently," and that the closing must be a "permanent end of operations—not a removal," those tests are not met in this case. The employer was Deering-Milliken, and it did not go out of business. The Darlington production was simply transferred to other Deering-Milliken mills. In that sense this is a "runaway" plant situation.[16]

If, as the court below thought, it was significant whether there was a permanent closing or a removal, the fact that the Darlington machinery was sold should not weigh against the fact that the Darlington production was assumed by other mills in the same chain. The large textile chains as a normal part of their operations regularly dispose of antiquated mills and replace them with newer mills,

[16] Mr. John R. Schoemer, Jr., one of the attorneys for Deering-Milliken, Inc. in the court below, is the author of an article entitled *Case of the Runaway Author: Professor Johannesen's Article on the Darlington Case*, 13 Lab. L. J. 356 (1962). In this article Mr. Schoemer undertook to answer an earlier article by Professor Johannesen entitled *The Case of the Runaway Mill: Darlington Mfg. Co.*, 12 Lab. L. J. 1189 (1961). Mr. Schoemer stated (p. 358):

> "And to compound the distortion of the record, the author later makes the flat statement that when Darlington liquidated, its existing business was simply transferred to other mills included within this 'textile empire' (p. 1194). If these facts were true, they would provide some justification for the indiscriminate labeling of Darlington as a 'runaway mill,' but in fact the statements are false."

often at different localities.[17] That does not mean that the parent chain is in any real sense going permanently out of business, either in whole or in part. Thus even if the proposition of the court below that an employer has an absolute right to go out of business permanently, regardless of motive, were accepted, this is not that case.

However, no such doctrine is, or should be, known to the law.

2. A more technical rationale given by the court below in support of its decision is that the Act applies to employers and unions only "so long as they are in the relationship of employer and employee." Hence (R. VI, 1899):

> "It [the Act] does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity, so long as the obligations of any employment contract have been met."

The total ignorance of the content of a major federal statute which these assertions disclose is rather breathtaking.

The statute's operation is of course in no way limited to the time when persons are in the relationship of employer and employee with each other. It applies before

[17] TWUA's research department endeavors to keep informed on the opening and closing of textile mills, though its data is no doubt incomplete. At the request of counsel for the AFL-CIO, it tabulated its information as to the opening and closing of mills over the past ten years by six major textile chains, *viz.*, Burlington Industries, Inc., Dan River Mills, Inc., Deering, Milliken, Inc., Indian Head Mills, M. Lowenstein & Sons, Inc., and J. P. Stevens & Co., Inc. During that period these six textile chains disposed of 73 plants, 27 being sold as operating plants and 46 being closed; and acquired 201 plants, 189 through purchase or lease of existing plants, 11 by new construction, and one by plant reopening. During this ten year period Deering-Milliken closed three plants, including Darlington, and acquired 11, 10 through purchase and one by new construction.

such a relationship is created, and bans an employer's discriminatory refusal to hire union members. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177. The statute likewise bans discriminatory discharge for union membership or activity. Section 8(a)(3); upheld in *Associated Press* v. *NLRB*, 301 U.S. 103.

Under the rationale and language of the court below an employer would, absent an employment contract, be free to discharge employees for any reason, such as union membership, for the statute would cease to apply with the termination of "the relationship of employer and employee." That of course is nonsense.

3. A second rationale, if that is not too flattering a term, advanced by the majority below is that an employer who goes out of business to avoid dealing with a union or to punish his employees has imposed the ultimate penalty upon himself, so that the Board and courts have no power to impose any other or additional penalty. Thus the court said, "If a cessation of business is adopted to avoid labor relations, the proprietor pays the price for it * * *" (R. VI, 1899). Again, "The predominant element of the principle we maintain is that the business is no longer extant and the owner has forfeited the penalty for withdrawing, that is, he has foregone the privilege of further pursuit of his business." (R. VI, 1901.)

This notion of self-punishment seems to be interrelated with the idea that the closing must be permanent, so as to be costly to the employer.

The statute provides that the Board shall order such relief as will effectuate the policies of the Act. It does not provide that an employer's violation of the Act shall be exculpated if his course of conduct is sufficiently costly to

himself.[18] As stated in a discussion of this case in 16 Stanford L. Rev. 209, 214 (1963):

> "That an employer will rarely go out of business simply to avoid dealing with a union and that when it does so it will bring upon itself its own penalty, since the action will normally result in the loss of profits, are of little solace to the employee who has been discriminatorily deprived of his livelihood.

4. Finally, the court below thought it clear that an employer cannot be compelled to remain in business, and indeed that "A statute authorizing an order forcing the continued pursuit of operations * * * would be of doubtful validity." (R. VI, 1899). Reasoning backward from that premise, the court concluded that an employer therefore could not be held in violation of the Act for going out of business, regardless of motive.

This reasoning confuses two quite different issues, *viz.*, (1) whether a shutdown may, ever, violate the Act, and (2) whether, if so, the Board has power to order resumption of operations. It is not necessary to decide the second question in order to decide the first, for the evident reason that even if the Board could not order resumption of operations, a shutdown might nevertheless be a violation of the Act which the Board could remedy by an order not including resumption of operations.

Indeed the Board did not order resumption of operations in this case. We think the Board was in error; that the

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[18] The record does not establish whether the closing of the Darlington mill was or was not costly from the standpoint of Deering-Milliken. Undoubtedly the closing was costly to the employees and to the community, and perhaps to the minority stockholders in Darlington whose views were overriden. However, the respondents contended that the closing was dictated by normal business considerations and would have taken place regardless of the vote for the union. While this contention was rejected by the Trial Examiner and the Board, it suggests that the closing may not have been financially disadvantageous from the standpoint of Deering-Milliken.

relief it ordered is wholly inadequate to effectuate the policies of the Act; and that this Court should direct the Board to order Deering-Milliken to reopen a Darlington mill and to offer reinstatement there to the laid-off Darlington employees. But however that may be, that is a wholly separate question from whether the shutdown violated the Act. For the court below to determine the question whether there was a violation on the basis of whether a particular remedy for the violation would be valid—a remedy which the Board had refused to grant—is pure Alice-in-Wonderland.

The lower court's confusing of the separate issues of violation and remedy is underlined by its reliance on *Southport Petroleum Co.* v. *NLRB*, 315 U. S. 100, which, the court below asserted "implicitly recognized" the right of an owner to go out of business at his option, so long as the closure is intended to be permanent "even if spurred by unionization." (R. VI, 1900). In *Southport* the Board ordered the company to reinstate with back pay three employees who had been discriminatorily discharged. After the Board had filed its petition for enforcement with the Court of Appeals, the company filed an application with the court to adduce additional evidence before the Board that title to its refinery had been permanently transferred to a new corporation not connected with it. The court denied the application, and this Court affirmed the denial.

There was no contention in *Southport* that the dissolution itself constituted an unfair labor practice, and it likewise was not questioned that the discriminatory discharges violated the Act. The only question was whether the company should have been permitted to adduce evidence of transfer of the refinery because of the bearing that might have on the framing of the remedial order. We of course do not question that the shutdown of the Darlington mill must be taken into account in this case, not only because

the shutdown itself (unlike the transfer in *Southport*) violated the Act, but in connection with the framing of the remedial order.

Furthermore an employer no more has, as the court below put it, an "absolute prerogative" to go out of business, either permanently or temporarily, than employees have an absolute right to strike, either permanently or temporarily. Both rights are subject to regulation in the public interest by the National Labor Relations Act. When an employer engages in a shutdown in violation of the Act, he can properly be ordered to resume operations, just as employees who engage in a forbidden strike can be ordered to resume work.

As this Court stated in *Wiley* v. *Livingston*, 376 U. S. 543, 549, though in a different context:

> "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."

We submit that there is no absolute barrier, constitutional or otherwise, to ordering an employer to reopen a plant, when such an order is appropriate to effectuate the policies of the Act. (We leave to the brief of TWUA the demonstration that such an order is appropriate in this case.)

The Thirteenth Amendment's ban on involuntary servitude, if that be what the court below had in mind, might bar an order requiring an individual member of management or an individual employee to remain at his post, when he wished to quit. The Amendment might also bar an order requiring an individual owner-operator of a business to resume operation, though that is less clear. *Cf. NLRB* v. *Savoy Laundry, Inc.*, 327 F. 2d 370 (2d Cir.). But the

Amendment's reach is limited to banning involuntary labor by individuals; it confers no constitutional right to shut down a business, whether by decision of its owners or managers or the concerted action of its employees.

Indeed, there has never been any "absolute prerogative" to go out of business, or to perpetuate an illegal discontinuance.

It will hardly be suggested that an agreement between competing businesses that one of them will shut down, or the purchase of plants of a competitor in order to shut them down, is immune from the anti-trust laws. These were among the techniques employed in *United States* v. *American Tobacco Co.*, 221 U. S. 106, 174-175:

> "Thus, it is beyond dispute: First, that since the organization of the new American Tobacco Company that company has acquired four large tobacco concerns, that restrictive covenants against engaging in the tobacco business were taken from the sellers, and that the plants were not continued in operation, but were at once abandoned."

The Court, however, did not regard the shutdowns as within some "absolute prerogative" of the owner, but as particularly invidious methods of violating the law. It said (221 U. S. at 182-183):

> "* * * we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: * * * *e.* By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade."

And the Court directed the lower court to devise a plan "of dissolving the combination and of recreating" a condition in harmony with the law.

Even governmental bodies do not have any "absolute pre-

rogative" to discontinue operations, if the object of the discontinuance is an unlawful one. *Griffin* v. *Prince Edward County School Board*, 377 U. S. 218. The Court declared (p. 231): "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one * * *." And, on the question of relief, the Court held (p. 233) that—

> "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia."

Obviously no constitutional problem of the slightest substance would be involved in ordering Deering-Milliken to reestablish a mill in Darlington, and to offer employment there to those it illegally discharged.

CONCLUSION

For the reasons stated herein and in the brief for TWUA, it is submitted that the decision below should be reversed.

Respectfully submitted,

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